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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Amendment of 47 C.F.R. Sec. 1.1200
et seq. Concerning Ex Parte
Presentations in Commission
Proceedings

GC Docket No. 95-21

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MCI COMMENTS

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SUMMARY

The Commission is proposing a number of revisions to the current ex parte rules in this Notice of Proposed Rulemaking (NPRM). Generally, the Commission is proposing to prohibit ex parte presentations only in proceedings in which such presentations are barred by the Administrative Procedure Act (APA).¹ Ex parte presentations would be permitted in other proceedings but would have to be disclosed in the public record. The NPRM also addresses whether the Sunshine Period prohibition contained in the present ex parte rules should be modified. It reflects a proposal that the Sunshine Period prohibition should extend to circulation items but not to public meetings or forums. Finally, the NPRM reflects some miscellaneous proposals for making the ex parte rules more effective. The Commission has invited comments on changes to these rules with a view toward reformulating them in a simpler manner.²

MCI generally agrees with the Commission's tentative conclusion that the proposed scheme of ex parte rules would result in a less complex system and would allow individuals to more readily understand the rules.³ There are, however, a few specific proposals that may have an effect that is inconsistent with the general thrust of the NPRM. First, communications

¹ See 5 U.S.C. Sec. 557(d); NPRM at para. 1.

² Id. at para. 8.

³ Id. at para. 13.

between carriers and the Commission regarding informal common carrier complaints and tariff proceedings prior to investigation should not be subject to ex parte rules. Second, the Commission should foreclose ex parte communications when a formal complaint is contemplated. Third, allowing a three-day period after an ex parte presentation for submitting notification of the presentation would not permit sufficient time for interested persons to respond in a timely manner. Fourth, otherwise non-restricted proceedings should only be restricted by the Commission upon public notice articulating reasons for the restriction. Fifth, comments of other federal agencies should not be exempt from ex parte limitations.

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MCI COMMENTS

MCI Telecommunications Corporation (MCI) hereby submits its comments in response to the Commission's Notice of Proposed Rule Making (NPRM), adopted and released February 7, 1995, FCC 95-52, in the above-captioned matter. The Commission is requesting comments on proposed changes in the rules governing ex parte communications in Commission proceedings. MCI generally supports the proposals in the NPRM and lauds the Commission's effort to provide increased opportunities for interested persons to provide relevant information to the Commission on important issues. However, as outlined below, MCI is concerned that the practical consequences of several of the proposals would be counterproductive.

INTRODUCTION

The Commission is proposing a number of revisions to the current ex parte rules. Generally, the Commission is proposing to prohibit ex parte presentations only in proceedings in which such presentations are barred by the Administrative Procedure Act

(APA).⁴ Ex parte presentations would be permitted in other proceedings but would have to be disclosed in the public record. The NPRM also addresses whether the Sunshine Period prohibition contained in the present ex parte rules should be modified. It reflects a proposal that the Sunshine Period prohibition should extend to circulation items but not to public meetings or forums. Finally, the NPRM reflects some miscellaneous proposals for making the ex parte rules more effective. The Commission has invited comments on changes to these rules with a view toward reformulating them in a simpler manner.⁵

**COMMUNICATIONS REGARDING TARIFFS PRIOR TO
INVESTIGATION SHOULD REMAIN EXEMPT FROM EX PARTE RULES**

The Commission is seeking comment on whether tariff proceedings should be moved from the "exempt" to "permit-but-disclose" category after oppositions are filed but before investigations occur. The proposed rules appear to embrace the move, as ex parte presentations in any proceeding not classified as exempt or restricted would be subject to the permit-but-disclose requirement. MCI does not support this proposal.

The application of ex parte disclosure procedures in tariff proceedings prior to an investigation would be administratively burdensome. On an annual basis, the Commission processes thousands of tariff filings made by dominant carriers. All these

⁴ See 5 U.S.C. Sec. 557(d); NPRM at para. 1.

⁵ Id. at para. 8.

filings must be reviewed, and all are subject to statutory deadlines.⁶ When Commission staff or petitioners raise questions about these filings, the Commission often is able to have the questions quickly answered via telephone or informal meetings with the filing carriers. Given the enormous size of the Commission's workload, it is likely that an ex parte process might cause delays in tariff processing if the Commission staff were to be burdened with ex parte reporting requirements. At a minimum, the number of ex parte communications filed with the Commission would increase sharply if petitioned tariffs become subject to ex parte requirements.

MCI further believes that it would be counterproductive for the tariff process to impose ex parte limitations on proposed tariffs pending Commission review. In the worst case, an ex parte requirement would mandate a formal procedural process that petitioners or carriers could use to obtain information about what others have said about a particular pending tariff. These requirements would make it much more difficult for Commission staff -- who have only days to gather information -- to engage opposing parties in an informal dialogue concerning the issues. If parties must wait for ex parte materials to become available in order to respond, the Commission staff will be penalized in its ability to gather information. Contrast this to the current system -- in which the staff is free to share any tariff related material filed, or oral representations made, with all parties

⁶ See Sec 203(b) of the Act and 47 C.F.R. Sec. 61.58.

without concern for ex parte rules. As the Common Carrier Bureau is well aware, pending tariffs often undergo significant and multiple changes. Given the dynamics of the tariff review process, the Commission staff's ability to gather information and ask appropriate questions should in no way be clouded by even the specter of ex parte procedural requirements.

Moreover, the application of ex parte restraints to tariff proceedings prior to an investigation and not designated for hearing is not legally required. As the Commission has previously noted, these proceedings are not viewed as "adjudicatory" under the APA and are not subject to statutory ex parte provisions applicable to formal rulemakings required to be "on the record."⁷ Prior to a designation for investigation or hearing, the tariff review process is discretionary and interlocutory in nature. It is designed to provide the Commission with information sufficient to determine whether to investigate a tariff filing; it is not intended to resolve all questions of lawfulness. Such questions are properly resolved in a Commission-initiated investigation or in a complaint proceeding under Section 208 of the Communications Act.⁸

⁷ Notice of Proposed Rulemaking, GC Docket 86-225, Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings, para. 34 (released July 9, 1986); See also 5 U.S.C. Sec. 557(d).

⁸ Communications Act of 1934, 47 U.S.C. Sec. 208 (1934 as amended) ("Act").

EX PARTE REPORTING SHOULD NOT APPLY TO INFORMAL COMPLAINTS

The current informal complaint procedures serve an important purpose by facilitating negotiated settlements. Frequently, persons seeking redress against alleged carrier violations of the Communications Act file informal complaints, with the intent of filing formal complaints if matters cannot be satisfactorily resolved. Informal complaints are sometimes subject to discussion among the parties and Commission staff and frequently are resolved in a mutually satisfactory manner, thereby obviating the need for the filing of formal complaints with their attendant burdens.

The Commission is proposing to no longer exempt from ex parte rules contacts involving informal complaints. Under the proposed rules, informal complaints, once served,⁹ would be subject to permit-but-disclose requirements.¹⁰ MCI disagrees with this proposal and urges its rejection. By subjecting informal complaints to ex parte requirements, the Commission may stifle the free exchange of information crucial to achieving negotiated settlements. Furthermore, the large majority of informal complainants are not versed in the intricacies of the Commission's Rules and cannot reasonably be expected to comply

⁹ There is usually a two to three month delay between the time the Commission receives a written informal complaint and the time it is served upon the carrier. As written, it appears that the proposed rule would not apply until after a complaint was in fact served upon a carrier.

¹⁰ NPRM at para. 29.

with them by following up their oral presentations with written summaries. Accordingly, MCI submits, the Commission should continue to treat informal complaint proceedings as exempt from application of the ex parte rules.

THE COMMISSION SHOULD REVISE ITS RULES TO FORECLOSE EX PARTE COMMUNICATIONS WHEN A FORMAL COMPLAINT IS CONTEMPLATED

The flexibility which results from the non-application of ex parte rules to informal complaint proceedings should be removed when a party decides to file a formal complaint, or immediately upon referral of a court case to the Commission under the doctrine of primary jurisdiction. At such times, there should be no further contacts allowed between the potential formal complainant (or its representative) and Commission decision-makers concerning the subject of the complaint. Such contacts could have the effect of "poisoning the waters" and unduly influencing future litigation, given that the Commission will need to entertain that which would be the subject matter of discussions between Commission decision-makers and the future complainant. Accordingly, once a party decides to file a formal complaint, the ex parte rules should attach and all contacts with Commission decision-makers should be foreclosed until the matter is finally decided.¹¹

¹¹ To achieve this, the "Note" following 47 C.F.R. Sec. 1.1208(b)(2) should be eliminated. This rule currently reads:

**THE COMMISSION SHOULD ESTABLISH BETTER TIMING AND
NOTICE PROCEDURES FOR DISCLOSURE OF EX PARTE
COMMUNICATIONS**

Procedures for disclosure of ex parte communications must allow interested persons the opportunity to learn of and respond to them in a timely manner. It is crucial that procedures be established to ensure that written ex parte communications, and written notifications of oral ex parte presentations, are processed internally by the Commission in an efficient manner. No interested person should miss the opportunity to respond to an ex parte communication because of an untimely publication.

Because timing is such a central issue to disclosure of ex parte communications, MCI does not support the proposals that would allow three days after an oral ex parte presentation for filing written notification of the presentation and the same period after a written ex parte communication for filing the written communication with the Secretary's Office. Extending the filing will only deny interested parties an adequate opportunity to respond.

This problem may be demonstrated by an example. Assume a

"(b) No person shall make an ex parte presentation in a proceeding that could become restricted even though the proceeding is not restricted at the time if: (2) That person intends to file an opposition, complaint, or objection which would cause the proceeding to become restricted. NOTE: The prohibition in Sec. 1.1208(b)(2) is inapplicable to complaint proceedings under section 208 of the Communications Act [emphasis added]."

Sunshine Notice will be released March 23rd and a Commission agenda meeting is scheduled for March 30th. Assume also that there is a particular item which is likely to be on the agenda and a party wants to discuss the matter with the Commission without giving other parties an opportunity to comment.

Currently, if the party makes an oral presentation by March 22nd, the written notice must be filed with the Commission on the same day, and other parties would have an opportunity to learn of the presentation and respond to it. By lengthening the filing period to three days, a party making an oral presentation late in the day on March 20th would not need to file a written notification until late in the day on March 23rd, too late for other parties to respond.

To address this problem, MCI recommends requiring that notifications be filed within one day after ex parte presentations are made. This would achieve a reasonable balance between giving parties an opportunity to prepare and file notifications and giving other parties an opportunity to respond.

Under existing rules, written notifications of ex parte presentations in non-restricted proceedings must be filed if they disclose data and arguments not already reflected in a party's earlier record submissions in a proceeding. Apparently to provide greater disclosure, the Commission is proposing that written notifications be filed of all ex parte presentations in permit-but-disclose proceedings and that they summarize the entire content of presentations, even if the data or arguments

are not "new". While it makes sense to require written notifications regardless of whether new information is presented in presentations, it would be wasteful to require submission of written summaries of pleadings already filed and matters already in the public record. If no new data or arguments are presented at an ex parte presentation and a party's previously filed pleading in the proceeding were the only matter discussed, the written notification should so state without further elaboration. Written notifications should also identify the proceeding to which it relates, including the docket number, if any, the full names of all individuals present at the ex parte presentation, as well as the location, date, time, and duration of the meeting.

The proposed rules appear to reflect an assumption that persons who are required to report ex parte communications are aware of the requirement. MCI believes that this is not a reasonable assumption. It is especially likely that persons making ex parte communications that should be disclosed could not be aware of the requirements in rulemaking proceedings or proceedings involving a Joint Board, as members of the general public would be deemed parties of such proceedings. When situations arise prompting reporting of ex parte communications, the involved Commission personnel should be under an affirmative duty to either (1) inform the party of the requirement, or (2) file the required written documentation.

**PROCEEDINGS RESTRICTED ON A CASE-BY-CASE BASIS
SHOULD BE JUSTIFIED IN WRITING**

MCI recognizes that, occasionally, in unusual circumstances, it may be appropriate for the Commission to restrict certain otherwise non-restricted proceedings. Apparently reflecting a belief that ex parte rules should have sufficient flexibility to respond to unique situations, the Commission is proposing to restrict proceedings, on a case-by-case basis, if there is an unreasonable risk that ex parte presentations would be unfair to interested persons or the public. MCI supports this proposal, provided the proceeding is deemed restricted only upon the release of an appropriate order or public notice articulating reasons for such restriction.

**AN OPPORTUNITY SHOULD EXIST TO REBUT CLAIMS BY
OTHER AGENCIES**

In order to adopt the best possible decisions in open inquiries and rulemaking proceedings, the Commission must first seek all relevant information and a wide array of policy options. The Commission accomplishes this by allowing parties the opportunity to file comments and respond to comments submitted by other proceeding participants.

The Commission is proposing to exempt from ex parte limitations those presentations to or from the U.S. Justice Department or Federal Trade Commission involving telecommunications competition in proceedings that have not been designated for hearing and where the relevant agency is not a party. MCI does not support the proposal because it runs counter

to the basic Commission policy of subjecting views presented in proceedings to comments by other participants and due process rights requiring agency decisions based on a public record.¹² Simply put, this proposal would not provide interested persons with the opportunity to rebut claims made by these agencies.¹³ Moreover, adoption of the proposal would provide the agencies with no incentive to formally participate in proceedings. No special status with respect to communications should be accorded to either the Department of Justice or Federal Trade Commission. Rather than adopt the proposal, the Commission should reaffirm its practice of placing in the record any information it receives from other agencies which serves as a basis for any decisions it makes in particular proceedings.

¹² See, for example, American Lithotripsy Society v. Sullivan, 785 Supp. 1034, 1036 (D.C.C. 1992), where the court held that the "public" was "denied a "chance to comment on the methodology the agency used [for ratemaking]...[T]he agency... cannot function properly without having the benefit of such comments." See also U.S. Lines, Inc. v. FMC, 584 F.2d 519, 533-35, 541-43 (D.C. Cir. 1978), where the court [referring to the exclusion of intervenors in a ratemaking case] held that "there was no... opportunity for a real dialogue or exchange of views." Such secret proceedings are not only arbitrary and capricious, but also do "violence ... to the basic fairness concept of due process."

¹³ This would be especially important in proceedings involving telecommunications competition because (1) the "facts" of such proceedings are likely to involve complex "macro" economic theories, and (2) the stakes are likely to be too high to allow questionable theory to remain unchallenged.

**THE SUNSHINE PERIOD PROHIBITION SHOULD NOT APPLY
TO NON-FCC MEETINGS OPEN TO THE PUBLIC**

The NPRM addresses whether modifications should be made to the Sunshine Period prohibition. The NPRM addresses what it calls a "recurring problem" in the application of the Sunshine Period prohibition that occurs when Commissioners and Commission staff are present at industry-related meetings or symposia after the Commission's adoption of items, but before texts are released.¹⁴ To eliminate potential ex parte rule violations in such instances, the Commission is proposing to exempt from the Sunshine Period prohibition any presentation made in the course of a "widely attended speech or panel discussion and the subject concerns a Commission action that has been adopted." While MCI supports the elimination of requirements that may unreasonably encumber Commission and industry interaction, MCI believes that an additional explanation is warranted of the terms "widely attended speech or panel discussion." MCI supports this proposal provided the terms are clarified to mean "meetings open to the press, all segments of the telecommunications industry, and the general public". Exemptions from the Sunshine Period prohibition should not be permitted for private meetings or meetings that exclude any company, the press, or portion of the industry.

The Commission is also proposing to apply the Sunshine

¹⁴ NPRM at para. 41.

Period prohibition to "circulation items."¹⁵ Proposed rule Sec. 1.1203(b)(2) would apply the Sunshine Period prohibition to circulation items from the time the Commission issues a news release indicating that the Commission has adopted a decision or order relating to the matter until the Commission releases the text or order. MCI supports this proposal, but with the clarification that the phrase "being considered on circulation" in proposed rule Sec. 1.1203(a) be deleted and the phrase "adopted on circulation" substituted therein.¹⁶

OTHER MATTERS

As the NPRM indicates, Commission decisions regarding ex parte issues often involve substantial input from the Commission's Office of General Counsel. Reflecting this reality, MCI is supportive of the proposal that would delegate additional

¹⁵ "Circulation items," in contrast to "agenda items," are issues that will be decided without the Commission's resorting to a vote at a Commission meeting. After a Commissioner has voted on an issue "in circulation," it is forwarded to each of the other Commissioners' offices for their votes. Generally, circulation items involve matters that are less significant, in terms of policy impact, than agenda items.

¹⁶ By using this phrase, proposed rule Sec. 1.1203(a) might be interpreted to suggest that the Sunshine Period prohibition would apply to circulation items prior to the Commission's having adopted a decision or order on the matter. This interpretation would be directly at odds with proposed rule Sec. 1.1203(b)(2). Further confusion is caused by the text of the NPRM (at para. 40), which raises for comment the question of whether the Commission should provide for a Sunshine Period for circulation items commencing with the issuance of a news release. MCI believes that it would be bad policy to apply the Sunshine Period prohibition prior to the announcement that a circulation matter has been adopted.

authority to the Office of General Counsel in such matters. MCI believes that any person should be able to voluntarily consult with the Office of General Counsel and seek clarification of the ex parte rules.

However, MCI does not support the proposal that would require that persons who believe their intended behavior may violate the ex parte rules consult with the Office of General Counsel before taking such action. The proposal is based upon the mistaken premise that interested persons have some duty to act when they are unclear or confused about a regulation. Moreover, it wrongly requires the Office of General Counsel to assume the role of legal advisor to private parties. Such parties should be able to seek legal counsel from attorneys of their own choice.

MCI does not support the proposal that disqualification from a proceeding be an available sanction for those who violate the ex parte rules. A fine would be a far more appropriate remedy, achieving the same goal of ensuring compliance with Commission Rules, while not denying the Commission of potentially valuable information.

Finally, since the Commission has clarified that ex parte rules apply to "e-mail" or electronic messages from members of the public to its decision-making personnel,¹⁷ the Commission should establish new procedures for the electronic filing of ex

¹⁷ See Public Notice, March 16, 1994, DA 94-240, "Application of Ex Parte Rules to Internet E-Mail".

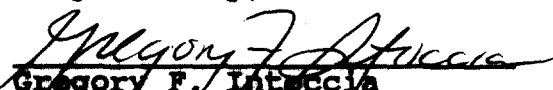
parte presentations. Under existing practice, if an e-mail ex parte presentation is transmitted to the Commission, two paper or "hard" copies of that presentation and any transmittal letter must also be provided. It does not make sense to allow persons to communicate electronically with the Commission, yet require them to file paper copies of their communications. Internal procedures should be established to ensure that electronic messages are placed with other filings in the same docket.

CONCLUSION

WHEREFORE, MCI requests that the Commission consider the above comments in fashioning any new rules and in otherwise addressing the issues in the NPRM.

Respectfully,

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